No. 2865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLICK,
Proctor for Appellee.

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It is admitted by the appellee that if the charter party in question contained a clause prohibiting the charterers from giving liens on the steamship "South Coast", the appellee would not, under the ruling of the lower Court that he had notice of the terms of the charter, be entitled to a lien for the supplies furnished to the vessel by him. The charter party contains no such express limitation on the legally presumed right of the charterer to give liens on the vessel, but the appellant claims that such a limitation should, necessarily, be implied from the provision in the charter that the charterer should pay for all supplies, repairs, and

other charges against the vessel. This, in our opinion, does not necessarily follow as the one is not in the least inconsistent with the other. Who shall pay for the supplies is one question and whether or not a lien shall attach to the vessel until it is paid, is another entirely independent of the first.

There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it. An examination of these early cases, however, will convince the Court that the rulings there made can not prevail today against the modern law on this subject. We refer to the "Kate", 164 U. S. 458, 41 L. E. 512, and the "Valencia", 165 U. S. 264, 41 L. E. 710, both cited and followed in the case of the "Underwriter", 119, f. 713, relied on by the appellants. We can not better show to the Court the most uncertain state of the law, in this connection, at that time than by referring to the excellent review of the authorities in the latter case by Judge Lowell of the District Court for the Northern District of Massachusetts. The situation was by no means clarified by the local statutes under which most of these cases were decided, but waiving any questions raised by the state statutes, Judge Lowell, on page 751, shows what the various conditions are surrounding a lien for supplies furnished to a vessel under the general admiralty law and the difficulty of enforcing such a lien. On page 755, the Court

explains the basis of the decisions in the "Kate" and the "Valencia" as follows:

> "(b) On the other hand in the 'Valencia', 165 U. S. 264, 271, 17 Sup. Ct. 323, 325, 41 L. Ed. 710, it was said that: 'In the absence of an agreement, express or implied, for a lien a contract for supplies made directly with the owner, in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived'. * * * And the extended discussion in the 'Kate', 164 U. S. 458, 465-470, 17 Sup. Ct. 135, 41 L. E. 512, treats the lien as created by authority confided in the master by the owner. This is to say that the nonexistence of the lien in the presence of the owner arises from a want of authority in the master to find the vessel when the owner himself is present."

It is true that the "Underwriter" does hold that it is only when a vessel is in a port of distress that a supply man will be given a lien, where the terms of the charter party provide that the charterer shall pay for the supplies, but we think that the proctors for appellant are in error when they apparently claim that that case was affirmed in the "Francis J. O'Hara, Jr.", 229 F. 312. The terms of the charter party, if any, in the latter case are not set out, and, in all probability there was no charter party. The Court found as a fact that the master was without authority to give a lien on the vessel, citing a case decided by the state Court, Rich v. Jordan, 164 Mass. 127, 41 N. E. 56, which in turn cited three other cases de-

cided by the Courts of that state: Uran v. Fletcher, 1 Gray 125; Baker v. Haskins, 5 Gray 596; Tucker v. Stimson, 12 Gray 487. It seems that all of those local cases were decided under a rule peculiar to the state of Massachusetts, that is, that the master is prohibited from giving a lien on the vessel where the owner has given over the entire possession and control of the vessel to a third party.

Whether in the O'Hara case the denial of a lien was based on a local rule having its inception in a local custom of small fishing craft, or an express limitation of authority in the agreement between the vessel owner and the charterer, is not material, the principal point being that the lien was not denied simply because the charterer had agreed to pay for the supplies. This conclusion is further fortified by the Court citing the "Eureka", 209 F. 373, where the charter party contained an express limitation of authority, and observing that the slightest inquiry would have disclosed that the master had no authority to buy on the vessel's account. It seems also that the Court makes a distinction between an agreement to pay for supplies and a limitation of authority to give a lien on the vessel for supplies, and, that the one does not necessarily include the other. Page 314:

> "Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to these important facts."

The holding in the "Underwriter", above stated, has been overruled by the Circuit Court of Appeals in the case of the "Surprise", 129 F. 873. In that case supplies were furnished to a vessel under charter and the vessel was held liable therefor. It was contended by the claimant and owner that the libelant was informed of the charter party and that under the terms of the same, the charterers were bound to pay for the operating expenses including supplies furnished to the vessel and to keep the vessel free from liens. It was held that it is immaterial to the right to a lien for ordinary supplies furnished on the order of the master of a vessel being navigated by a charterer, whether or not there is a formal charter party expressly providing that the charterer shall make all disbursements and protect the vessel from liens, since that is an implied condition of every charter. In holding that a maritime lien existed in favor of the libelant for the supplies so furnished, the Court says on pages 877 and 878:

> "We should also observe that much has been made of the fact that in 'The Kate' and 'The Valencia', there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the

same as those specially provided in 'The Kate' and 'The Valencia'. The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement, as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on 'The Kate' and 'The Valencia', regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof.

Coming to the merits of the appeal, it will be found that for each libelant, it is disposed of by 'The Philadelphia', except only so far as a distinction can be made, if one can be, arising from the fact that in 'The Philadelphia' it did not appear that the merchant knew, or ought to have known, that there was a charter, while, at bar, the claimant of the steamer insists that the libelants were expressly informed of the charter and its terms, or were put on notice in reference thereto. The conclusion which we reach will concede that additional element."

The Court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessaries and so they were in the case at bar. We prefer, however, not to put the

case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower Court.

If then, a supply man, by reason of his having knowledge of the charter party is chargeable also with the knowledge that the charterer is bound to pay the operating expenses of the vessel and keep the same free from liens, it must necessarily follow that Congress in giving a lien for supplies furnished on the order of the charterers, or the master representing them, intended that the further presumed knowledge of the charterer's liability for operating expenses should also be immaterial. Any other interpretation would be most illogical and amount pro tanto to an annullment of the act. For example: A supply man furnishes supplies to a vessel on the order of the master representing the charterers. Under the law (Fed. Stat.) he is entitled to a lien on that state of facts; but says the owner, the law presumes that from your knowledge of the charter, you were also aware that the charterers were bound to pay the operating expenses, and consequently you have no lien. Thus the legal presumption in favor of a lien from a given state of facts would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June, 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under

the Federal Act of said date and that nothing can defeat his lien except affirmative proof that he knew, or ought to have known that the charter party prohibited the charterer from giving a lien on the vessel.

As far as the appellee is concerned, this case should be decided precisely the same as though there was no clause in the charter party requiring the charterers to pay the operating expenses, for it can not possibly be construed into a limitation upon the authority of the charterers to bind the vessel as required by the third section of the Federal Act. The charter party contains no such express limitation, and we have been unable to find any case decided since the statute was enacted which placed the construction upon it contended for by the appellant. On the other hand, the case of the "Surprise" (supra) is referred to in Northwestern Fuel Co. v. Dunkley Williams Co., 174 F. 121, 125, and it was admitted that under the rule of that case the lien would have been allowed except for the fact that it appeared from the evidence that credit was given to the charterers and not to the vessel, a circumstance which is no longer material under the Federal statute. Again, the "Surprise" (supra) is quoted with approval in the "J. Dogherty," (1913), 207 F. 997, on page 1001 as follows:

> "By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter party on the part of the libelant is

> concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The 'Surprise', 129 F. 873, 64 C. C. A. 309."

In the "Oceana", 233 F. 139, 146, it was said that:

> "There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restrictions, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority."

The words "must be an actual restriction of authority" are significant.

The charges of bad faith on the part of the appellee need not be considered at length here for if, according to the true construction of the charter party, there was in fact no actual restriction of authority, then there could be no bad faith on the part of the appellee in furnishing the supplies to the vessel. Nor are we disposed to attach any special importance to the clause in the Federal statute: "For any other reason" as that must be interpreted according to the general rule in regard to general words following special words and held to mean "for any other reason similar to the ones set out specially in the statute". The lower Court unquestionably concluded that the charter party in the present case was the only agreement between

the appellant and the charterers which in any way affected the right to give a lien on the vessel, and, consequently, its reference to only the charter party.

It is claimed by the appellant that the letter which it sent to Mr. Mills, set out on pages 49 and 50 of its brief, operated as a subsequent contract or a construction of the former one between the charterer and appellant, and that by its terms the charterers could not purchase supplies on the credit of the vessel. This is on the assumption that Mr. Mills was the agent of the charterers, whereas in fact, he was the agent of the appellant (Apostles, page 61). This is denied by the appellant (page 76), but that is only the conclusion of one of its officers, and a most natural one, in view of the fact that otherwise, it would be prejudicial to the interests of his company. He admits, however, that Mills acted as agent for the South Coast Steamship Company in chartering the vessel to Levick (page 77). It was this same Mills, who was instructed by appellant as its agent to notify those furnishing repairs and supplies to this vessel, that they must look to the charterers for payment, and not to the vessel. It is true that he failed to correctly advise appellee of the contents of the letter containing these instructions, but that does not, in any way, lessen the value of such evidence as showing that Mills was, in fact, the agent, or at least, the ostensible agent for the appellant in connection with this vessel. Besides, it nowhere

appears in the evidence that the charterers agreed to the construction placed on the charter party by the appellant, as set out in the letter to Mr. Mills, who denies having been in the employ of either party (pages 92-93).

Again, it must be remembered, that although, as pointed out in appellant's brief, the appellee never saw the charter party in question, still it having been determined by the lower Court that he had notice of its terms, the case must be determined precisely as though he had read the charter party before furnishing the supplies. In such case it can not be contended that any construction placed upon it by the owner and charterer would be binding upon him but it would be construed according to its legal effect.

The lower Court found that

> "while these provisions (of the charter party) require the charterer to pay all expenses incurred in operating the vessel, they do not deprive him of authority to bind the vessel therefor. Indeed, they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel, arising, or created during the term of the charter party" (Apostles, page 123).

In view of such stipulations in the charter party, it would seem unreasonable to hold that the parties did not contemplate that a situation might arise during the course of a voyage which would necessitate the placing of a lien on the vessel. On the

contrary, we think that the owner must be credited with common business prudence, and would not compel the charterer to make an agreement which in all probability would be prejudicial to its own interests. As often remarked in the books: "A ship is made to plow the seas," and if a vessel is compelled to lie idle and rot at the wharf because of needed supplies or minor repairs, the costs of which the charterers can not meet on account of insufficient funds on hand, the owner would be injured to a far greater extent than the charterers in nine cases out of ten. He has his vessel at stake and nothing to indemnify him but the uncertain capability of the charterers to respond in damages, or a chance of preventing a surety company from escaping liability in event that a bond was required to secure the faithful performance of the charter party.

As we view the situation, this Court must either overrule the holding in the "Underwriter" (supra), as was done in the case of the "Surprise" (supra), or must annul pro tanto the provision in the Federal Act giving to charterers, and their duly appointed agents, the presumed right to give a lien upon a vessel for necessary supplies furnished to it.

We respectfully submit that the ruling of the lower Court in this case, that a provision in a charter party requiring a charterer to pay the operating expenses, is not equivalent under the recent statute to a limitation in the charter party on the

authority of the charterer to bind the vessel is a correct statement of the law and that the decree of the lower Court should be affirmed.

Dated, San Francisco,
March 12, 1917.

IRA S. LILLICK,
Proctor for Appellee.